71248-9

71248-9

NO. 71248-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

2015 FEB 13 PM 2:50

STATE OF WASHINGTON,

Respondent,

v.

NANCY WALTON DRAHOLD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 2

1. PROCEDURAL FACTS 2

2. SUBSTANTIVE FACTS 3

C. ARGUMENT 7

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DRAHOLD'S MOTION FOR A MISTRIAL 7

a. Relevant Facts 8

b. The Trial Court Properly Exercised Its Discretion In Finding That The Juror Misconduct Did Not Require A Mistrial 11

2. THE EVIDENCE WAS SUFFICIENT FOR A JURY TO FIND BEYOND A REASONABLE DOUBT THAT DRAHOLD'S USE OF FORCE WAS UNLAWFUL 13

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN INSTRUCTING THE JURY ON THE STATE'S BURDEN TO DISPROVE SELF-DEFENSE SEPARATELY FROM THE TO-CONVICT INSTRUCTION 17

a. Relevant Facts 17

b. The Trial Court Properly Exercised Its Discretion In Giving The Standard WPIC To-Convict Instruction 18

D. CONCLUSION 22

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

In re Winship, 397 U.S. 358,
90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 14

Washington State:

Anfinson v. FedEx Ground Package Sys., Inc.,
159 Wn. App. 35, 244 P.3d 32 (2010), aff'd,
174 Wn.2d 851 (2012) 18

Brown v. Spokane County Fire Prot. Dist. No. 1,
100 Wn.2d 188, 668 P.2d 571 (1983) 12

State v. Acosta, 101 Wn.2d 612,
683 P.2d 1069 (1984) 14

State v. Barnes, 153 Wn.2d 378,
103 P.3d 1219 (2005) 18

State v. Briggs, 55 Wn. App. 44,
776 P.2d 1347 (1989) 11

State v. Cunningham, 93 Wn.2d 823,
613 P.2d 1139 (1980) 19

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012) 11, 18

State v. Gore, 101 Wn.2d 481,
681 P.2d 227 (1984) 21

State v. Green, 94 Wn.2d 216,
616 P.2d 628 (1980) 14

State v. Greiff, 141 Wn.2d 910,
10 P.3d 390 (2000) 11

State v. Hoffman, 116 Wn.2d 51,
804 P.2d 577 (1991) 19, 20, 21

State v. Kirkman, 159 Wn.2d 918,
155 P.3d 125 (2007) 12

State v. Lemieux, 75 Wn.2d 89,
448 P.2d 943 (1968) 12

State v. Meggyesy, 90 Wn. App. 693,
958 P.2d 319 (1998) 20

State v. Mills, 154 Wn.2d 1,
109 P.3d 415 (2005) 20

State v. Passafero, 79 Wn.2d 495,
487 P.2d 774 (1971) 19

State v. Recuenco, 154 Wn.2d 156,
110 P.3d 188 (2005) 20

State v. Salinas, 119 Wn.2d 192,
829 P.2d 1068 (1992) 14

State v. Sibert, 168 Wn.2d 306,
230 P.3d 142 (2010) 20

State v. Smith, 131 Wn.2d 258,
930 P.2d 917 (1997) 20

State v. Walden, 131 Wn.2d 469,
932 P.2d 1237 (1997) 14

Constitutional Provisions

Federal:

U.S. Const. amend. XIV 13

Statutes

Washington State:

RCW 9A.16.020 14

Other Authorities

WPIC 35.12 17

WPIC 35.19.01 17

A. ISSUES PRESENTED

1. Juror misconduct involving the injection of extrinsic evidence into deliberations requires a new trial if there are reasonable grounds to believe the defendant has been prejudiced. The extrinsic evidence to which the jury was exposed was entirely cumulative of undisputed evidence properly admitted at trial. Did the trial court properly exercise its discretion in denying the defendant's motion for a mistrial?

2. The evidence is sufficient to support a conviction if, viewing all evidence in the light most favorable to the State, a rational trier of fact could find that each element of the crime has been proven beyond a reasonable doubt. Testimony at trial indicated that an altercation began when the defendant began screaming angrily in the victim's face, and the victim did nothing more than use his hands to move the defendant out of his personal space while encouraging the defendant and co-defendant to leave the scene before the defendant and co-defendant began to scratch, punch, choke and kick the victim. Was the evidence sufficient for a jury to find beyond a reasonable doubt that the defendant's use of force against the victim was not lawful self-defense?

3. A trial court is not required to give a requested instruction when the subject is adequately covered by another instruction. The trial court chose to instruct the jury on the State's burden to disprove self-defense separately from the to-convict instruction, in a manner approved by the Washington State Supreme Court. Did the trial court abuse its discretion in declining to include the absence of self-defense in the to-convict instruction as proposed by the defendant?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Nancy Walton Drahold, and her co-defendant, Tony Lee Combs, with one count of assault in the second degree and one count of assault in the third degree. A jury found Drahold guilty as charged of assault in the second degree.[1] CP 31-32. The jury also returned a verdict of guilty as to a lesser degree offense on the second count, but that count was then vacated on double jeopardy grounds. CP 98-101; 15RP[2] 152.

[1] Combs waived his right to a jury trial and had a bench trial simultaneous to Drahold's jury trial. 3RP 174-75. The trial court found Combs guilty as charged. 15RP 151.

[2] The sixteen volumes of the report of proceedings are labeled by the transcriptionist as "Volume I," "Volume 2," etc. This brief will refer to them as "1RP," "2RP," etc.

2. SUBSTANTIVE FACTS.

Officer Randy Jensen of the Renton Police Department was off duty and in street clothes when he encountered Drahold and Combs in June of 2012. 4RP 172, 198-99. Jensen was driving his wife's minivan with his wife and young daughter in the vehicle with him. 5RP 7. As he was driving on Highway 167 in Renton, Jensen observed a white Mercedes swerve at a car in front of Jensen in a way that appeared intentional, as if to strike that car or push it out of its lane. 5RP 10-11, 34-35.

Shortly thereafter, Jensen ended up stopped as the third car in line in a right turn lane, behind the white Mercedes and the car at which the Mercedes had swerved. 5RP 35-37. The Mercedes was the first vehicle in the line, and although the right turn lane was controlled only by a yield sign and there appeared to be several opportunities to safely turn right, the Mercedes did not move. 5RP 35-38. As traffic built up behind Jensen's vehicle, other drivers began honking at the Mercedes. 5RP 37-39. The driver of the Mercedes then put a hand up through the sun roof and "flip[ped] off" the other cars in line. 5RP 39-40; 8RP 109.

As the Mercedes continued to sit in the turn lane without moving, Jensen yelled "Go!" out his open window. 5RP 41.

Immediately afterwards, a male (later identified as Combs) exited the driver's door and a female (later identified as Drahold) exited the front passenger door. 5RP 43; 8RP 111. Combs and Drahold started to quickly walk towards either Jensen's vehicle or the vehicle in front of him. 5RP 43.

Based on what he had seen earlier, Jensen feared that the two intended to physically confront either him for yelling "go" or the driver in front of him at which the Mercedes had earlier swerved. 5RP 43-46. Jensen wanted to prevent any possible attack on the driver in front of him, and knew from his training and experience that he would be at a disadvantage if Drahold and Combs confronted him while he was still in his vehicle, so Jensen quickly got out and walked to meet Drahold and Combs near the vehicle in front of Jensen's minivan. 5RP 46-49. As he did so, Jensen displayed his Renton police badge to Drahold and Combs in his outstretched hand and verbally identified himself as a police officer. 5RP 51.

Jensen encouraged the two to get back in their car and leave, and told them that 911 had already been called, although he did not know that this was in fact the case. 5RP 53-54. Drahold began screaming angrily at Jensen, telling him "I don't give a fuck

who you are," and came so close to Jensen's face that she bumped into him. 5RP 54-55. Because having someone who was so angry that close to him was a threat to his safety, and because he had no room to safely step back himself without stepping into traffic, Jensen put his hands on Drahold's upper body and pushed her out of his personal space. 5RP 57-58. He used only enough force to move Drahold away from him. 5RP 57. Combs then attempted to punch Jensen in the face, but Jensen saw it coming and stepped back so that the punch only struck his hands. 5RP 58-59.

Jensen then felt Drahold reach around him from behind and dig her fingernails into his mouth and cheeks. 5RP 59. Jensen grabbed at Drahold's hands, and after struggling with her for a few seconds, the next thing Jensen knew he was lying on his stomach on the pavement, with one of Combs's arms around his neck choking him and the other arm punching him repeatedly in the head. 5RP 59-63. While Jensen was on the ground, Drahold kicked him several times in the torso. 7RP 148, 191; 8RP 131, 184; 10RP 75. Fearing for his life, Jensen tried repeatedly to strike Combs with his right elbow. 5RP 61. Finally, suddenly and without obvious explanation, Combs released Jensen and backed away. 5RP 70-71.

After Jensen got to his feet, Drahold grabbed his shirt and began pulling at it, as Jensen tried to get away. 5RP 71. Jensen could hear his shirt begin to tear, and bent over to let the shirt come off over his head. 5RP 71. Drahold then threw the shirt to the ground and she and Combs returned to their vehicle. 5RP 71. Now very angry, Jensen followed them and stopped five or seven feet away from Combs and said, "Come at me again, motherfucker." 5RP 72-73. The comment was not intended to be a threat or a dare, but was said out of frustration and anger to indicate that Jensen was ready this time if Combs was going to attack him again. 5RP 74. Combs shook his head at Jensen, and then drove away in the Mercedes with Drahold. 5RP 74-75.

When Jensen returned to his minivan, his wife observed that he had a large swollen lump on the side of his head, blood coming from his mouth, and bloody scratches all over his face. 12RP 47. Medics and on-duty officers soon arrived in response to 911 calls from at least seven witnesses. 5RP 78; 7RP 144, 171; 8RP 132, 182; 9RP 84; 10RP 125; 12RP 19. Jensen was transported to the hospital briefly before being released. 5RP 79-80. Later that night, he noticed for the first time that his right shoulder was sore. 5RP 81. When the pain got worse over the next week or so, Jensen

went to his family doctor, but an x-ray revealed no broken bones. 5RP 90-91. After several more weeks of worsening pain, an MRI revealed that Jensen had a torn labrum in his right shoulder, which required surgery to fix. 5RP 93-94, 96.

At trial, the jury heard testimony from Jensen, his wife, and eight other civilians who had witnessed various parts of the altercation. Neither Drahold nor Combs testified in Drahold's trial. Additional facts are presented below in the sections to which they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DRAHOLD'S MOTION FOR A MISTRIAL.

Drahold contends that the trial court abused its discretion when it denied her motion for a mistrial after discovering that other jurors may have heard Juror Seven muttering to herself about her outside knowledge that Jensen had had surgery in the fall of 2012. This claim should be rejected. Juror Seven was promptly removed from the jury, and even if other jurors did hear her statements, there was no possibility that the jury's verdict was affected because Juror Seven's outside knowledge was entirely cumulative of uncontested evidence presented at trial.

a. Relevant Facts.

At trial, Randy Jensen testified that he had surgery to repair his injured shoulder in August 2012, and that as a result he was off duty or on light duty until November 2012. 5RP 96-98. Jensen's surgeon, Dr. Fred Huang, testified that he operated on Jensen's shoulder on August 13, 2012, and that he requires his patients to wear a shoulder immobilizer for eight weeks after the type of surgery that Jensen had. 5RP 181, 188. David Gifford, a physician's assistant at the surgical center, also mentioned Jensen's surgery during his testimony. 6RP 41.

Later in the trial, during the testimony of Jensen's wife, Kaitlin "Katie" Jensen, Juror Seven alerted the court during a recess that she recognized Katie[3] from having purchased a dog kennel from her about a year earlier. 12RP 22-23. The court notified the parties, and relayed that Juror Seven had not recognized Katie's name when it was read during jury selection, but now recognized her and remembered that when she picked up the kennel, Katie had mentioned that her husband could not help load the kennel into Juror Seven's car because he had just had surgery. 12RP 22.

[3] Katie Jensen is referred to by her first name solely to avoid confusion with her husband, Randy Jensen. No disrespect is intended.

Juror Seven was then questioned in open court without the other jurors present. 12RP 25. She stated that she had purchased a 6-foot dog kennel from Katie over Facebook in September or October of 2012. 12RP 25. When Juror Seven went to Katie's house to pick it up, Katie had explained that her husband couldn't help them load the kennel into Juror Seven's vehicle because he had had surgery. 12RP 25. Juror Seven did not see Randy Jensen while she was there. 12RP 28.

Juror Seven stated that after she thought she recognized Katie's face on the witness stand, she went through her email during a recess to see whether Katie was indeed the person from whom she had bought the kennel. 12RP 25-26. As she stood by the sink in the jury room and looked through her email, Juror Seven muttered to herself about how surprised she was to recognize Katie and about her recollection that Katie had said her husband was not able to help because of surgery. 12RP 27-28. As this was happening, the other jurors were at the table in the jury room.[4] 12RP 29.

---

[4] Although Drahold claims that Juror Seven "announced" the information about Jensen's surgery to the other jurors, Juror Seven explicitly told the court that she was "just talking to [her]self" by the sink at the time she mentioned the surgery, and was not intending to communicate that fact to the other jurors. 12RP 27.

The trial court dismissed Juror Seven from the jury, and instructed her not to say anything further to the other jurors. 12RP 29. Drahold then moved for a mistrial on the grounds that the other jurors could have overheard Juror Seven muttering to herself as she was going through her email. 12RP 29. The State opposed the motion on the grounds that there was no evidence that other jurors heard Juror Seven's muttered comments, and that even if they did there was no prejudice to Drahold since the fact that Jensen had surgery and had limited mobility afterward was not in dispute. 12RP 30-32.

The trial court reserved its ruling on the motion for the time being, but noted that the sink in the jury room was several steps down the hall from the main area of the jury room where the table is located. 12RP 33-34. Later that day, the court issued its ruling denying the motion for a mistrial. 12RP 102-04. The court stated that for purposes of its ruling, it would assume that the other jurors heard Juror Seven's muttered comments. The court found that even in that case there was no prejudicial impact on Drahold's ability to have a fair trial, because Juror Seven's statement only revealed that Jensen had an unspecified surgery and could not lift a large object afterwards, which was information that was undisputed

and had already been provided by multiple witnesses. 12RP 102-03.

b. The Trial Court Properly Exercised Its Discretion In Finding That The Juror Misconduct Did Not Require A Mistrial.

Juror misconduct involving the injection of extrinsic evidence into deliberations requires a new trial if there are reasonable grounds to believe the defendant has been prejudiced. State v. Briggs, 55 Wn. App. 44, 55-58, 776 P.2d 1347 (1989). Because the trial court is best suited to evaluate any prejudice that may result from juror misconduct, a trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. State v. Greiff, 141 Wn.2d 910, 921-22, 10 P.3d 390 (2000). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

The trial court did not abuse its discretion in denying Drahold's motion for a mistrial because, even assuming that the other jurors heard Juror Seven's muttered comments, there were no reasonable grounds to believe the defendant was prejudiced as a result. The jury was instructed that it was to render a verdict based only on the evidence presented in the courtroom, and jurors

are presumed to follow the court's instructions. CP 65; State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). More importantly, the only information conveyed by Juror Seven's muttered statements was that Katie Jensen had told her that Katie's husband had had surgery and was unable to help lift a large dog kennel. 12RP 26-27. This information was already before the jury, as the jury had heard testimony that Randy Jensen had shoulder surgery in August 2012 and was unable to use his shoulder normally for months afterwards. 5RP 96-98, 181, 188; 6RP 41.

Because the extrinsic evidence offered by Juror Seven was merely cumulative of properly admitted evidence, there were no reasonable grounds to believe Drahold was prejudiced, and a mistrial was not warranted. See Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 198, 668 P.2d 571 (1983) (finding it "highly unlikely" that extrinsic evidence about juror's personal observations of accident location affected the verdict where it was cumulative of numerous photographic exhibits properly admitted at trial); State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) (witness's improper ex parte comment to the jury referencing that he was the one who gave the police key evidence did not require a new trial because it was cumulative of his trial testimony).

Furthermore, the fact that Jensen had surgery in August 2012 and had limited use of his shoulder while he was recovering from the surgery was not in dispute. Drahold never challenged the extent of Jensen's injury, or even that it resulted from the altercation with Drahold and Combs; her sole argument for acquittal was that her use of force against Jensen was lawful self-defense. 15RP 10-31.

Because the extrinsic evidence possibly introduced by Juror Seven was cumulative of undisputed evidence properly admitted at trial, there were no reasonable grounds to believe Drahold was prejudiced as a result, and the trial court properly exercised its discretion in denying Drahold's motion for a mistrial.

2. THE EVIDENCE WAS SUFFICIENT FOR A JURY TO FIND BEYOND A REASONABLE DOUBT THAT DRAHOLD'S USE OF FORCE WAS UNLAWFUL.

Drahold contends that the evidence was insufficient for a reasonable jury to find beyond a reasonable doubt that Drahold's use of force against Jensen was unlawful. This claim should be rejected. Jensen testified that Combs and Drahold were the initial aggressors, and multiple witnesses corroborated that testimony.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every

When viewed in the light most favorable to the State, the evidence in this case established that Jensen's actions did not place Drahold or Combs[5] in reasonable fear that either of them was about to be injured prior to their use of force against Jensen. When the confrontation began, Jensen was trying to convince Combs and Drahold to drive away. 5RP 53-54. When Drahold bumped Jensen chest-to-chest while screaming angrily at him, Jensen merely used his hands to move her away from him, and did not attempt to hit or grab her. 5RP 56-58.

Although there was no indication that Jensen was about to initiate further physical contact with either Drahold or Combs, Combs then attempted to punch Jensen in the face, and Drahold began scratching Jensen's face from behind.[6] 5RP 58-60. Before Jensen could do anything more than grab Drahold's hands to try to stop her from assaulting him further, Combs placed Jensen in a chokehold on the ground and punched him repeatedly in the head. 5RP 60-61. Drahold then kicked Jensen as he lay defenseless on the ground. 7RP 148, 191; 8RP 131, 184; 10RP 75.

---

[5] Because the jury was instructed on accomplice liability, it could have convicted Drahold either as a principal or as Combs's accomplice. CP 73, 79.

[6] Every witness who saw the altercation begin corroborated Jensen's testimony that Combs was the first aggressor. 8RP 128, 181; 10RP 73; 12RP 20.

The first time Jensen used any force that had a reasonable chance of injuring anyone was when he was on the ground and tried to strike Combs with his right elbow to defend himself from being choked and punched. 5RP 61. The evidence was thus sufficient to allow the jury to find beyond a reasonable doubt that Drahold and Combs did not reasonably believe that either of them was about to be injured when they used force against Jensen, making their use of force unlawful.

Even if Drahold or Combs had subjectively feared that they were about to be injured, the evidence established that they both used far more force than was necessary. Any danger they could have conceivably felt initially was clearly gone by the time Jensen was pinned face-down on the ground, yet Combs proceeded to choke him and punch him in the head, and Drahold proceeded to kick him repeatedly in the torso. 5RP 61-63; 7RP 148, 191; 8RP 131, 184; 10RP 75. The evidence was thus sufficient to allow the jury to find beyond a reasonable doubt that both Drahold and Combs used more force that was necessary, rendering their use of force unlawful.

Because the evidence was sufficient for the jury to find beyond a reasonable doubt that Drahold's and Combs's use of force was unlawful, this Court should affirm Drahold's conviction.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN INSTRUCTING THE JURY ON THE STATE'S BURDEN TO DISPROVE SELF-DEFENSE SEPARATELY FROM THE TO-CONVICT INSTRUCTION.

Drahold contends that the trial court erred in giving the standard WPIC to-convict instruction and instructing the jury separately on the State's burden to disprove self-defense, rather than including absence of self-defense as an element in the to-convict instruction as proposed by Drahold. This claim should be rejected. The Washington State Supreme Court has specifically approved of the manner of instructing the jury used in this case, and that holding remains binding on this Court.

a. Relevant Facts.

The State proposed a to-convict instruction that mirrored the standard WPIC to-convict instruction for assault in the second degree by alternative means. CP 146; WPIC 35.12; WPIC 35.19.01. Drahold proposed a nearly identical instruction, but added an additional element that "the force used by the defendant was not lawful." CP 47. Both Drahold and the State also proposed

separate instructions on the State's burden to disprove self-defense. CP 50, 167-69.

The trial court declined to give Drahold's proposed to-convict instruction, instead giving the standard WPIC version proposed by the State, and separately instructed the jury on the State's burden to disprove self-defense. 14RP 37; CP 79, 82-84.

b. The Trial Court Properly Exercised Its Discretion In Giving The Standard WPIC To-Convict Instruction.

Jury instructions are reviewed de novo to ensure that they accurately state the applicable law, do not mislead the jury, and allow the parties to argue their theories of the case. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Once those criteria are met, a trial court's decision regarding the specific wording of instructions is reviewed only for abuse of discretion. Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 44, 244 P.3d 32 (2010), aff'd, 174 Wn.2d 851 (2012). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. Emery, 174 Wn.2d at 765.

Here, the jury instructions accurately stated the applicable law, did not mislead the jury, and allowed the parties to argue their theories of the case. The court's to-convict instruction accurately

instructed the jury on the elements of the crime, and a separate instruction accurately instructed the jury on the lawful use of force and the State's burden to prove beyond a reasonable doubt that the defendant's use of force was not lawful. CP 79, 82-84. Drahold does not contend that the instructions prevented her from arguing her theory of the case or that the separate instruction on self-defense was inaccurate in any way—indeed, she proposed a nearly identical instruction. CP 50.

Drahold's only contention is that, because her proposed to-convict instruction was also an accurate statement of the law, the trial court was obligated to give it. Brief of Appellant at 20. However, a trial court is not required to give a requested instruction when the subject is adequately covered by another instruction.[7] State v. Passafero, 79 Wn.2d 495, 487 P.2d 774 (1971); State v. Hoffman, 116 Wn.2d 51, 111, 804 P.2d 577 (1991).

---

[7] Even if it were error to refuse to give any accurate instruction proposed by the defendant, as Drahold contends, such error would be harmless here because there is not a reasonable probability that the outcome of the trial would have been materially affected had the court given Drahold's proposed to-convict instruction. See State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

The manner the trial court used to instruct the jury in this case was specifically approved by our supreme court in Hoffman. 116 Wn.2d at 109. Drahold acknowledges that fact, but argues that Hoffman is inconsistent with subsequent cases such as State v. Smith,[8] State v. Mills,[9] and State v. Sibert,[10] and therefore should not be followed. Brief of Appellant at 22 n.5.

This claim should be rejected, as none of the cited cases support Drahold's argument. Smith simply invalidated a to-convict instruction that allowed the jury to convict the defendant for lesser conduct than was charged in the information, and this Court has already determined that Smith did not overrule Hoffman. Smith, 131 Wn.2d at 263; State v. Meggyesy, 90 Wn. App. 693, 705, 958 P.2d 319 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). Mills held that it is permissible to instruct the jury on an essential element that raises a base crime to a higher level in a separate special verdict form rather than in the to-convict instruction. 154 Wn.2d at 10. And Sibert held that it was not error to omit the identity of the charged

---

[8] 131 Wn.2d 258, 930 P.2d 917 (1997).

[9] 154 Wn.2d 1, 10, 109 P.3d 415 (2005).

[10] 168 Wn.2d 306, 230 P.3d 142 (2010).

controlled substance from the to-convict instruction even though that was an "essential element" of the crime. 168 Wn.2d at 311-13.

If anything, these cases support rather than undermine Hoffman's conclusion that not every fact the State must prove beyond a reasonable doubt needs to appear in the to-convict instruction. Furthermore, none of the cases cited by Drahold question Hoffman's holding; that holding thus remains binding on this Court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) ("[O]nce this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court.").

Because the procedure used by the trial court in this case has been specifically approved by our supreme court, and because that holding remains binding on all lower courts, the trial court properly exercised its discretion in instructing the jury on the State's burden to disprove self-defense separately from the to-convict instruction.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Drahold's conviction.

DATED this 13th day of February, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

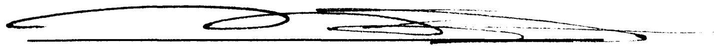
By: ______________________
STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Maureen Cyr, the attorney for the appellant, at Maureen@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Nancy Walton Drahold, Cause No. 71248-9, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of February, 2015.



Name:
Done in Seattle, Washington